Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-264

In the Matter of

Proposals to Reform the
Commission's Comparative
Hearing Process to Expedite
the Resolution of Cases

NOTICE OF PROPOSED RULE MAKING

Adopted: May 10, 1990; Released: June 26, 1990

By the Commission: Commissioners Barret and Duggan issuing separate statements.

1. The Commission requests public comment on ways to expedite its comparative hearing processes for new applicants by significantly revising its hearing rules. *See* 47 C.F.R. §§ 1.201-1.364.

I. BACKGROUND AND SUMMARY

2. On several occasions, the Commission has sought to revise its hearing procedures. Most recently, in the *Notice of Proposed Rule Making* in *Broadcast Lotteries*, 54 Fed. Reg. 11416 (March 20, 1989), we proposed to eliminate entirely the need to conduct trial type hearings to select between otherwise qualified applicants for new broadcast facilities.[1] However, a number of commenters, including the Federal Communications Bar Association (FCBA), opposed the concept of selecting broadcast licensees by random selection. They argue that the comparative hearing process provides a check on the *bona fides* of each applicant, and that it serves to maintain the overall quality of the applicant pool. Rather than eliminating the comparative hearing, the FCBA suggested the process be reformed in ways designed to expedite the resolution of these cases. Some of the reforms proposed by the FCBA to be considered in this proceeding include reconsideration of the *Anax* policy and the imposition of time limits on hearing decisions.[2]

3. We believe that the FCBA is correct and that the Commission should explore ways to reduce the amount of time which hearings consume before abandoning the hearing process altogether. In no way, however, does this indicate a change in our belief that the substantial time consumed in the process of selecting among applicants for new broadcast facilities greatly disserves the public. During the selection process, the public is deprived of a valued service, and the ultimate licensee is deprived of the opportunity to provide that service. In this regard, our review of recent hearing cases indicates that the average case prosecuted from designation for hearing, through a hearing, an Initial Decision (ID), a Review Board Decision, and a Commission decision takes almost three years (33 months) to complete. We believe that such delay fundamentally disserves the public interest and further believe that there are a number of procedural and organizational strategies that will reduce the amount of time consumed by this process, perhaps as much as two-thirds. Those strategies include:

(I) Encouragement of more and/or earlier settlements by requiring earlier payment of the hearing fee, using pre-designation settlement advocates, settlement conferences before ALJs, and using alternative dispute resolution techniques such as mediation, arbitration, and early neutral evaluation;

(II) Expedition of discovery, hearings and the ID by the earlier commencement of discovery, limiting the types of discovery available, imposing time limits on discovery, strictly limiting oral testimony at hearings, imposing time limits on the hearing, overruling or modifying the *Anax* decision, and setting time guidelines for the preparation of the ID; and

(III) Expedition of appeals by limiting oral argument before the Review Board and imposing time guidelines on the completion of the review process. We are also considering organizational changes including eliminating the Review Board, bringing the Review Board more directly under the supervision of the Commission, or combining the Review Board and the Adjudication Division of the Office of General Counsel.

II. ENCOURAGING SETTLEMENTS

4. Settlements are a significant factor in expediting the hearing process. When a case is settled, service to the public is expedited, and government resources that would have been devoted to the resolution of that case can be turned to the resolution of those cases that remain. Thus, those resources can be used more efficiently to resolve other cases faster. Moreover, the earlier a case is settled, the greater the resource savings, and although all settlements serve to expedite the provision of new service to the public (by eliminating, *e.g.*, Commission or judicial review), the earlier a settlement takes place the sooner that new service can be provided. Thus, we seek means to promote more and earlier settlements in order to speed the provision of new service and free government resources for decisions in those cases that are not settled.

5. In the present system, although it takes almost three years for a case to complete the full adjudicatory process from Hearing Designation Order (HDO) to Commission decision, the overwhelming majority of cases are settled before going through that entire process. Indeed, in fiscal year (FY) 1988, 90% of the comparative broadcast cases disposed of by ALJs were settled prior to IDs, and, in FY 1989, 78% of ALJ case disposals were by settlement prior to an ID.[3] Given their public interest benefits, our obvious objective should be to encourage even more cases to settle and to do so as early in the process as possible. While other aspects of our recommendations (*e.g.*, limiting and speeding up discovery) may also serve this purpose, we invite comment on the following specific strategies as well as other strategies to encourage more and earlier settlements.

A. The Hearing Fee

6. Of the cases disposed of by the ALJs in FY 1989, approximately 20% involved settlements that were approved within three months of assignment of the case to a judge. Practitioners consistently point to the $6,000 hearing fee as a primary reason for early settlements.[4] Under current rules, the fee must be paid with an applicant's notice of appearance, 47 C.F.R. § 1.1104(a)(3), (b)(3), filed 20 days after the mailing of the designation order, 47 C.F.R. § 1.221, but that fee is waived where the applicants file a full settlement by the notice of appearance deadline. 47 C.F.R. § 1.1111(c). As refund of a hearing fee is not available for settlements filed after the notice of appearance deadline, the hearing fee provides a strong incentive for early settlements.

7. However, in proceedings that involve numerous applicants, parties may prefer to wait until the payment of the hearing fee "separates the wheat from the chaff" before engaging in settlement talks. For example, in FY 1989, the ALJs disposed of 31 comparative cases in which more than eight applicants were designated. Originally, 421 applicants were designated in those 31 cases, but only 173 remained at disposition. We believe that the hearing fee served as a mechanism to reduce the number of applicants in these cases, thereby simplifying their ultimate disposition by settlement or otherwise.[5]

8. Given the effect of the hearing fee, we believe that requiring payment of the hearing fee prior to the issuance of the HDO would be preferable. To this end, we propose to amend 47 C.F.R. § 1.221 to require the filing of the notice of appearance and fee before the release of the HDO. Under this procedure, the staff would send the applicants a pre-designation notice approximately 30, 60, or more days before the HDO is to be issued. That notice would establish the date for filing notices of appearance and the hearing fee. The applicants would have at least 30 days to assess their position and conclude any pre-designation settlements before the fee was due. If a full settlement is reached prior to designation, no fee would be due, but, where a full settlement is not reached and filed on or before the notice of appearance deadline, any applicants that fail to pay the fee would be dismissed prior to designation. With fewer applicants, the resulting case would be easier to handle and more likely to be settled.[6]

B. Pre-Designation Settlements

9. That same pre-designation notice or a separate notification from a "settlement advocate" could also be used to encourage applicants to settle the case before the HDO. The "settlement advocate" would be a Commission employee whose role would be to focus the applicants on a settlement of the case before designation. The settlement advocate could emphasize the (proposed) limitations on settlement reimbursements and point out that, as the applicants spend more and more money on the prosecution of their applications, it becomes increasingly unlikely that any applicant would have the financial ability to fully compensate competing applicants for their entire out-of-pocket expenses. Thus, the earlier a settlement takes place, the greater the likelihood that dismissing applicants would be able to recover all of their legitimate and prudent expenses. Commenters should also address whether the pre-designation settlement process would be enhanced by requiring all pending applicants that have not supplied the additional information on financing and integration proposals now required by FCC Form 301 to provide that information in an amendment to their applications.[7]

10. The settlement advocate could also encourage applicants to consider mergers by which the need for a comparative hearing could be eliminated or the number of applicants could be reduced. We also propose that amendments reflecting mergers between pending mutually exclusive broadcast applications would be filed as a matter of right under 47 C.F.R. § 73.3522. Even where the merger involves less than all the mutually exclusive applicants, it would reduce the number of applications designated for hearing, and thereby simplify the ultimate resolution of the case. Generally, our long standing policy has been that applicants should not be permitted to upgrade their comparative standing, by merger or otherwise, after the applications are "frozen" for comparative purposes.[8] *See Daytona Broadcasting Co., Inc.*, 101 FCC 2d 1010, 1012, *recon. granted in part*, 102 FCC 2d 931 (1986). To encourage mergers, we will consider proposals to modify that policy to permit the merged applicant to enjoy the comparative advantages achieved by virtue of the merger.[9] Parties putting forth or commenting on such proposals should also address the issue of whether a policy of permissive comparative enhancement through mergers would lead to abuses of the Commission's processes and possibly serve as a disincentive to early settlements.

C. Settlement Conferences

11. Of the cases that are settled, about 75% are terminated by agreement after the HDO but before the ID. As an alternative to the pre-designation settlement advocate, we seek comment on means to encourage more settlements after designation but before trial. Conventional wisdom suggests that most of these settlements take place on the eve of trial. Generally, the exchange of direct cases and the discovery process reveal the relative strengths and weaknesses of the applicants, and settlements are reached based on that information and to avoid incurring the additional costs and delays of a hearing and the decisional processes. Although ALJs commonly use pre-hearing conferences as a vehicle to explore settlements, we believe that the efficacy of ALJ-aided settlement discussions would be significantly improved if such conferences occurred just before trial, a time when the parties naturally consider the possibility of an amicable resolution of the case.

12. Moreover, because the ALJ assigned to the case may ultimately be called upon to make a decision on the basis of the record evidence, he or she may not be in the best position to openly discuss the relative merits of the parties' cases. We believe that settlement conferences would be more efficacious if they were conducted "off the record" before a "settlement judge." In a report on the use of settlement judges, the Administrative Conference of the United States (ACUS) recommends that settlement judges should be ALJs from the same bench as the ALJ who will decide the case. Joseph and Gilbert, *Breaking the Settlement Ice : The Use of Settlement Judges in Administrative Proceedings*, 24-26 (1988). The settlement judge would be free to meet with the parties individually and to make frank and independent evaluations of each party's case to encourage the end of the dispute without further litigation.

13. ACUS also recommends that recourse to the settlement judge works best where the matter in litigation is one subject to compromise and the parties, or a party, requests such a procedure. *Id.* at 37. However, in licensing proceedings, where one applicant is granted and the others are denied, there may be little room for "compromise." We seek suggestions of policies that would create additional room for compromise and encourage parties to voluntarily seek out the services of settlement judges. For example, where settlements by merger take place as a result of conferences with the settlement judge, and if the settlement judge so recommends, we could permit the merged applicant to take full advantage of the comparative merits that may flow from the merger.[10] As with pre-designation mergers, we ask commenters to address themselves to any potential abuses or disincentives to settlement that may flow from this proposal.

14. We also propose to add monetary incentives to the settlement judge process. The question of how much an applicant should be paid in a settlement is being addressed in *Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, FCC 90-193 (adopted May 10, 1990).[11] In this proceeding, we propose to provide added impetus to post-designation settlements, by amending 47 C.F.R. § 1.1111(c) to permit a settlement judge to recommend a refund of up to half the hearing fee in cases that are settled in this manner. Interested parties are also invited to comment on whether the settlement judge procedure should be a mandatory, routine part of the hearing process or a voluntary procedure to be employed only when the applicants request it.

D. The Ruarch Policy

15. In *Ruarch Associates*, 103 FCC 2d 1178 (1986), the applicant had committed itself to divest a co-owned station to avoid a comparative demerit. In approving the settlement, the Commission relieved the applicant of that commitment. Since then, *Ruarch* has stood for the policy that settlements extinguish the continuing validity of integration, as well as divestiture commitments that had been made during the comparative hearing process. *See WCVQ, Inc.*, 4 FCC Rcd 4079 (Rev. Bd. 1989) *application for review pending*. The FCBA's comments in *Broadcast Lotteries* noted that, in *WCVQ*, the Review Board suggested that the *Ruarch* policy facilitates integration gamesmanship and encourages abuse and consequent cynicism about the integrity of the comparative process. The FCBA suggests that we reconsider the issue of whether a settlement of a comparative case should extinguish an applicant's obligation to comply with the commitments made during the hearing proceeding. It does not appear that reversing a policy of such short duration and limited application would have an adverse impact on the number of comparative cases terminated by settlement,[12] and we invite comment on the suggestion that we reverse *Ruarch Associates* and its progeny. We also seek comment on appropriate means to ensure the future adherence to promises made in applications for purposes of enhancing an applicant's comparative standing under diversity and integration criteria.

E. Other Alternative Dispute Resolution Techniques

16. Alternative dispute resolution techniques include arbitration, mediation, and early neutral evaluation. The settlement conference discussed above encompasses aspects of mediation and early neutral evaluation in that the settlement judge would attempt to mediate the monetary demands of the parties, assess their relative chances of success and encourage a resolution without recourse to the expensive and, at times, uncertain, hearing process. Interested commenters may wish to recommend other alternative dispute resolution techniques they believe would be effective in the comparative hearing context.

III. EXPEDITING THE HEARING PROCESS

17. Of the comparative cases that are prosecuted through the hearing, it takes an average of 17 months from the HDO to the ID. Generally, these cases spend about 9 months in the pre-hearing (discovery) phase, and, although the hearing itself takes relatively little time, judges routinely keep the record open beyond the end of the hearing for the receipt of additional evidence. *See* 47 C.F.R. § 1.258. Although the rules provide that proposed findings of fact and conclusions "shall be filed within 20 days after the record is closed," additional time is routinely allowed. *See* 47 C.F.R. § 1.263(a). In our view, the earlier commencement and termination of discovery, overruling or modifying the *Anax* case, limitations on oral testimony, expeditious closing of the record, and early filing of proposed findings would permit ALJs to complete their IDs in significantly less time than is presently required. We also believe that such time savings should be reflected in proposed time guidelines for the ID.

A. Discovery

18. Generally, discovery does not begin until the filing of notices of appearance (20 days after mailing the HDO), and, in many cases, little is accomplished between the HDO and the first pre-hearing conference. We believe that this "dead time" can be put to productive use. Our proposal to require the filing of the notice of appearance and hearing fee before issuance of the HDO will permit the commencement of discovery immediately upon the release of the HDO, and, under this proposal, we propose to use the HDO to establish the immediate commencement and a firm date for the conclusion of discovery. We also propose to use the HDO to set out a schedule for the early phases of the hearing, including the assignment of the presiding ALJ and the establishment of firm dates for the exchange of direct written cases.[13] In the alternative, appropriate amendments to Part 1 of the Commission's rules could establish these procedural dates by rule. In either case, otherwise wasted time can be utilized to move the case forward.

19. In 1979, the Commission contracted with former FCC General Counsel Max Paglin for a comprehensive study of its discovery procedures to determine whether reforms were necessary. As a consequence of Paglin's recommendations, the Commission amended its discovery rules in a number of respects.[14] However, the Commission rejected three of Paglin's suggestions: (1) eliminating or strictly limiting discovery in "routine" comparative cases; (2) shortening the time periods allowed for depositions and interrogatories; and (3) eliminating the use of oral depositions of parties or principals in initial licensing proceedings, unless a persuasive showing is made.

20. In addition to initiating discovery earlier, as discussed above, we propose to revisit the issue of whether to accept Paglin's 1979 proposals to strictly limit discovery and shorten the time during which discovery can take

place. Specifically, we believe that it would be reasonable to conclude the discovery portion of comparative cases within 60 days after issuance of the HDO. We also seek comment on whether we should limit the discovery tools available to the parties. Although the time limits will curtail the use of some of the more time consuming and less efficient discovery tools, we are open to suggestions that the availability of those discovery techniques are inappropriate in routine comparative cases. For example, if oral depositions remain generally available, or even if their use is limited as suggested by Paglin, it may be appropriate to generally preclude the use of written interrogatories in these cases.

B. The " Anax " Doctrine.

21. In *Anax Broadcasting, Inc.*, 87 FCC 2d 483 (1981), the Commission allowed applicants to exclude limited partners (and the owners of non-voting stock) from the calculus by which it determines the comparative credit for integration of ownership and management (as well as for diversity). *Anax* was not specifically designed to foster female and minority ownership, but it has had that effect by enabling these individuals to use the financial backing of others without detracting from the applicant's comparative status.

22. The FCBA's comments in *Broadcast Lotteries* suggest that the active investor/passive investor structure often raises the question of who actually controls the applicant and whether the structure is a sham. Thus, FCBA argues that applications taking advantage of the *Anax* doctrine consume excessive amounts of time and effort in discovery and litigation. FCBA suggests that elimination of the policy would simplify and shorten comparative hearings. We recognize that the *Anax* policy serves to increase the number of financially qualified applicants before the Commission, but it has also spawned considerable litigation over the *bona fides* of such applications. This litigation in turn often significantly delays the issuance of final decisions and the institution of service to the public. Thus, we propose to overturn the policy and treat all ownership interests equally for purposes of determining the comparative standing of applicants.

23. We also seek comment on alternatives by which the litigation spawned by the *Anax* doctrine could be avoided while still preserving some of the comparative benefits achieved by applicants using the active/passive ownership structure. One such alternative might require that a minimum percentage of equity be held by integrated owners. *See Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982) (tax certificates available where a minority general partner holds at least 20% equity interest in the partnership). We will also consider whether it would be desirable to create a presumption that a "passive" owner who undertakes the role of forming, financing and initiating the application should be deemed active for purposes of our comparative evaluation and the circumstances in which such a presumption could be rebutted. Such a presumption could modify our holding in *Coast TV*, FCC 90-120, released April 27, 1990. In addition to addressing the proposal to overturn or modify the *Anax* policy, comments are invited on whether such action should be applied to all applications that are currently on file or in hearing status before ALJs, the Review Board, or the Commission.[15]

C. Written Cases

24. We also propose to require the use of written cases except in the most unusual circumstances. In considering applications for initial licenses, the Administrative Procedure Act permits the Commission to adopt procedures for the submission of all or part of the evidence in written form "when a party will not be prejudiced thereby...."[16] In 1976, the Commission adopted a rule designed to expedite hearings by authorizing ALJs to require submission of written evidence in initial licensing proceedings.[17]

25. In expedited major market cellular comparative cases, the Commission required both written direct and written rebuttal cases, and it required a specific showing to the presiding judge before parties could present oral testimony. In those cases, oral testimony was virtually eliminated, and the hearings were concluded in substantially less time than broadcast comparative proceedings. Moreover, other agencies have experienced a considerable degree of success in shortening the duration of the administrative process by strictly limiting oral testimony at hearings. *See* Idles, *The ICC Hearing Process: a Cost-Benefit Approach to Administrative Agency Alternative Dispute Resolution*, 16 Transportation Law Journal 99 (1987).

26. Therefore, practical experience indicates that the use of strictly written procedures can expedite the hearing process, and we propose to require the submission of written direct and rebuttal cases. In general, we recommend adhering to the 1982 study's conclusion that ALJ's should not be precluded entirely from taking oral testimony. For some types of issues, it may be necessary to observe the demeanor of the witnesses to assess their credibility, and, in other instances, cross examination may be required. However, we propose that oral testimony should be permitted by the ALJ only in the unusual case, where material issues of decisional fact can not adequately be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings. We believe that a reduction in the amount of unnecessary oral testimony is not only permissible in that it will expedite the conclusion of the case, but it is also desirable as a means of speeding service to the public. *See United States v. FCC*, 652 F.2d 72, 95 (D.C. Cir. 1980).

D. Time Guidelines

27. Of the 44 cases disposed of by initial decisions in FY 1989, the average time for disposition was about 17 months. However, in expedited cellular proceedings, the Commission limited the use of discovery, encouraged purely written submissions, and encouraged ALJs to write their decisions in under 60 days.[18] As a result, it appears that the average time from designation to initial decisions in the cellular cases was 11 months.

28. Based on our experience in the expedited cellular cases and the reforms proposed above, our goal is the resolution of routine comparative cases by ID within seven months of the HDO. As noted above, the HDO would provide 60 days for the conduct of discovery. It would also establish a date about 30 days after completion of discovery for the exchange of exhibits. The hearing would be scheduled about 15 days after the exhibit exchange.[19] The record should be closed immediately at the end of whatever hearing is necessary, and an early date should be established for the filing of proposed findings and reply findings. If the evidence is purely written, we propose that findings be filed within 20 days of the close of the record. If there has been oral testimony, the availability of transcripts may justify additional time, but we do not propose

to permit more than 30 days for filing proposed findings. Under this schedule, the ALJs will have about 60 days from the last pleading to prepare and release the ID. That is the same amount of time as was suggested in the expedited cellular cases, and we believe it is a reasonable guideline for these broadcast comparative cases.[20]

IV. EXPEDITING REVIEW

29. As a companion to our proposal to resolve comparative hearing cases in 7 months, we propose to resolve any appeals of those cases within the Commission in an even shorter time frame. Currently, an ALJ's initial decision can go through essentially two levels of extensive review, one by the Review Board and one by the Commission. That review can take very nearly as long to complete as it does to conduct the hearing and release the ALJ's decision.[21] We propose procedures and/or changes in the Commission's organizational structure intended to reduce substantially the time during which a case is pending on appeal within the Commission. For example, in addition to strategies to expedite the review function in its current form, we will consider elimination of the intermediate review process as well as staff reorganizations that might make the intermediate and Commission review process more efficient. Our goal is to resolve these cases with a final Commission decision within six months of the ID.

A. Eliminate Intermediate Review

30. Proposals to eliminate the Review Board have appeared from time to time, both in Congress and at the Commission. For example, the "Federal Communications Commission Authorizations Act of 1981," which set up the Office of Managing Director to improve FCC management, suggested in its legislative history that "the Review Board . . . can be substantially reduced or eliminated." S. Rep. No. 73, 97th Cong., 1st Sess. 3 (1981). The Senate report expressed "doubt as to whether the Review Board truly expedites the resolution of adjudicatory matters as intended." *Id.*

31. In response, the Office of the Managing Director completed a study evaluating the "Need for a Review Board," Project #14, in 1981. The report noted that each time the Commission previously had considered abolishing the Review Board, it had rejected that option. The principal argument in support of eliminating the Board has been that it would shorten an "adjudicatory chain" criticized for its length and delay. Nevertheless, as the report noted, the Commission in the past has concluded that the Board should be retained in order to free the Commissioners to spend more time on policy-related matters. The report recommended that no changes be made to the current structure.

32. Although our review of recent cases indicates that it takes the Board an average of seven months from the ID to dispose of appeals,[22] elimination of the Board would not automatically cut seven months off the current review time. Of the decisions rendered by the Board, approximately half are never appealed to the Commission, and elimination of the Board would most probably double the number of comparative hearing appeals considered by the Commission.[23] Moreover, because the Communications Act provides for the filing of exceptions to initial decisions, 47 U.S.C. § 409(b), and the Administrative Procedure Act requires that each exception be ruled upon by the reviewing authority, 5 U.S.C. § 557(c), elimination of the Board would require even closer Commission scrutiny of all appeals from initial decisions. Nevertheless, it would appear that the elimination of the Review Board and the use of those staff resources to help prepare Commission decisions in adjudicatory cases might reduce the appeals time for such cases.[24]

B. Reorganize the Intermediate Review Function

33. The internal appellate procedures for hearing cases can be reorganized while maintaining the two-tiered review system. Under the first of the two reorganization proposals being put out for comment, the Review Board and its staff would be consolidated with the staff that prepares adjudicatory decisions for the Commission. Because the Review Board is not intended to be a policy-making body independent of the Commission, such a consolidation of functions would not violate any requirement that the Review Board remain an independent level of review. *See* 47 U.S.C. § 155(c).

34. In these circumstances, consolidation might achieve important time savings without counterbalancing sacrifices. For example, it would allow the FCC to assign one staff member to handle a case from the release of the ALJ's initial decision all the way through to a Commission decision. The same staff member would draft both the Review Board's decision and the Commission's decision. Because the staff attorney would have previously become familiar with the legal issues and the record in the case, it is estimated that, depending on the complexity of the case and the issues presented, several weeks may be saved in the drafting of opinions at the Commission level. It should be noted that, where the Commission reviews non-hearing adjudicatory matters like waivers, the decision submitted to the Commission for consideration is routinely prepared by the same Bureau or Office staff that prepared the decision rendered under delegated authority. This reorganization proposal would apply these same efficiencies to hearing cases.

35. There does not appear to be any legal bar to such a reorganization. The Communications Act provides that the Review Board must consist of at least two employees selected by the full Commission. 47 U.S.C. § 155(c). The Act also provides that Board members must be qualified for their duties and may perform "no duties inconsistent" with their review functions. 47 U.S.C. § 155(c)(8). The legislative history of this provision states explicitly that it is appropriate for Board members to assist "Commissioners in drafting of opinions." *See* H.R. Report No. 996, 87th Cong., 1st Sess. 9 (1961). The only legal constraints on who can give advice to the Commission in hearing cases are the *ex parte* proscriptions in section 409(c)(7) of the Act and section 557(d) of the APA. 5 U.S.C. § 557(d). The Review Board members and staff, however, are decisionmaking personnel; they are not parties subject to the *ex parte* prohibitions.[25]

36. The statutory policies reflected in the APA and the amendments to the Communications Act discussed above would apply with the same force to consultations between the Review Board and the Commission.[26] Indeed, because the purpose of the Review Board was merely to free the Commission from burdensome review functions, the degree to which the Commission chooses to provide legal and policy guidance and advice to the Board should be viewed as a matter that is largely within its discretion.[27]

37. Although we will also consider other options for the location of the Board under this proposal, locating the Review Board in the Office of General Counsel appears to be the most efficacious choice. The Adjudication Division of that office currently prepares Commission decisions on adjudicatory matters, and joining the Review Board and the Adjudication Division under the General Counsel would be more economical than creating a new office. In the alternative, the Board and the Adjudication Division could be merged under the Review Board. In addition to the proposed relocation of the Board as it is presently constituted, we will also consider disbandment of the present Board and assigning the intermediate review function to employees in the Office of General Counsel. For example, the Board could be composed of the General Counsel and a Deputy General Counsel or two Deputy General Counsels.[28]

38. We seek comment on all these options, including the maintenance of the existing two-tiered review system as it is presently organized. As previously noted, the Review Board provides a valuable service by rendering final decisions in about half the cases presented to it and by focusing the issues for Commission consideration in those cases in which further review is sought. In this manner, the Board frees the Commission to spend more time on policy-related matters. Thus, the following proposals are intended to expedite the two-tiered review process, and parties should feel free to put forth other proposals that might make that process more efficient.

C. Oral Argument

39. We propose to limit oral argument before the Review Board and the Commission to cases involving extraordinary circumstances. We believe that elimination of oral argument in most hearing cases would significantly expedite the review process.

40. In 1961, Congress deleted a provision in the Act that had required the Commission to hear oral argument or exceptions from initial decisions. Thus, the Commission (or the Board) has the discretion not to hear oral argument. *See* S. Rep. No. 576, 87th Cong., 1st Sess. 15 (1961). However, we note that the legislative history of the 1961 amendments indicates that Congress "expected that this valuable procedure [oral argument] would still be greatly employed by the Commission or . . . . [the Review Board]."[29] In the expedited cellular radio cases discussed earlier, the Commission heard oral argument in only a very few of the comparative cases. We similarly propose to amend the rules to provide that oral argument be allowed only where it is requested by the parties and the Board or Commission finds that it will assist in the resolution of the issues presented on appeal.

D. Time Guidelines

41. The Commission's rules currently require the Review Board to adopt a decision within 180 days after release of an ID. As previously noted, the Review Board is currently issuing decisions an average of 7 months after the initial decision. On average, the Commission's decisions are issued about nine months after the Review Board's decision. Interestingly, section 5(d) of the Communications Act requires the Commission to conduct its business with the objective of rendering a decision in hearing cases "within six months from the final date of the hearing . . . ." 47 U.S.C. § 155(d).[30] The policy enunciated in this section did not contemplate the two-stage review process that now exists.[31]

42. Nevertheless, we propose to adopt internal guidelines establishing a goal of issuing final agency decisions in these comparative cases within six months of the IDs. To accomplish this within the framework of a two tier review system, we propose to require the filing of exceptions to IDs within 20 days of the release of those decisions. Oppositions would be due ten days thereafter. The Board would then have 60 days to render its decision. Applications for review of Board decisions would likewise have to be filed within 20 days, with ten days for oppositions, and the Commission would have 60 days to render its decision. If only Commission review of IDs is permitted, some additional time could be permitted in the pleading cycle and in the time for a Commission decision while still shortening the overall time for the review process. For example, we could permit the parties to file exceptions within 30 days of the ID. Oppositions would be due 15 days thereafter, and the Commission would have 90 days to render a decision.

43. In the alternative, in an April 5, 1990 letter, the FCBA's Adjudicatory Practice Committee suggested that the Commission adopt a rule requiring that applications for review from Review Board decisions be acted upon within six months after they are filed. Under the FCBA proposal, if the application for review was not acted on in six months, it would be deemed denied, and Review Board's decision would become final. The case would then be subject to judicial review on the basis of the Review Board's decision. We seek comment on the FCBA proposal as an alternative or supplement to the time guidelines set out above. We also seek comment on appropriate criteria for a limited exception to our proposed time guidelines and/or the FCBA proposal. For example, cases involving an unusually large number of applicants, novel issues, or complex facts may be candidates for such an exception.

V. CONCLUSION

44. Undue delay in the process of selecting which of otherwise qualified applicants should be granted disserves the public. The time consumed in that process delays the institution of new service, and it exacts an economic toll on both the Government and the applicants. To the extent that we can limit the time consumed in that process to the minimum, we will be serving the potential listening and viewing public, the American taxpayer and the applicants. Indeed, even the losing applicant is better served by expedited consideration that costs less and permits it to devote time and energies to other endeavors at an earlier date.

45. Our review of the processes currently in place, along with our review of other processes that have been utilized by the FCC and other agencies, lead us to the conclusion that much can be done to expedite the resolution of these cases. Accordingly, we invite public comment on the proposals set out above. Those proposals are firmly rooted in our commitment to resolve comparative broadcast hearings by Commission decision in just over one year from their designation, and we ask commenters to keep that goal in mind. We will also entertain other proposals designed to achieve the same end.

VI. PROCEDURAL MATTERS

46. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206 *et seq*. The Sunshine Agenda period commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter, (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda, or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

47. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

48. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

49. Pursuant to applicable procedures set forth in 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before August 27, 1990 of this Notice, and reply comments on or before September 26, 1990. Extensions of these time periods are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

50. The rules proposed herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to impose no new or modified requirements or burdens on the public.

51. Initial Regulatory Flexibility Analysis:

I. Reason for the Action:

To consider proposals to expedite the resolution of comparative hearings involving applicants for new broadcast facilities.

II. Objective of this Action:

To expedite the resolution of comparative hearings involving applicants for new broadcast facilities.

III. Legal Basis:

This proceeding is initiated under sections 5(b), 5(c) and 309 of the Communications Act of 1934, as amended.

IV. Number and Type of Small Entities Affected by the Proposed Rule:

Applicants for available new broadcast facilities are, for the most part small entities. Presently, the Commission has pending approximately 3,000 such applications that may, upon designation for hearing, come under the rules proposed herein.

V. Reporting, Recordkeeping, and Other Compliance Requirements Inherent in the Proposed Rule:

None.

VI. Federal Rules which Overlap, Duplicate, or Conflict with the Proposed Rule:

None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objective of the Action:

Because the proposal would expedite the resolution of comparative broadcast hearings for new applicants, it will generally permit the successful applicant to commence operation of the new station at an earlier date. Thus, the applicants, generally small entities, will be benefited by the proposal. The Commission is also open to any other suggestions to fulfill its goal of expediting the comparative hearing process with a minimum of cost or inconvenience to applicants.

52. IT IS ORDERED that a copy of this Notice of Proposed Rule Making shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

53. This action is taken pursuant to authority contained in sections 5(b), 5(c) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 155(b), 155(c) and 309. For further information concerning this proceeding, contact Martin Blumenthal, Office of General Counsel (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] For the reasons stated in the *Order* in that proceeding, adopted today, we have concluded that lotteries should not be used to select among otherwise qualified applicants for new full service broadcast stations.

[2] *Anax Broadcasting Inc.*, 87 FCC 2d 483 (1981). The FCBA also suggested that the Commission consider limitations on settlement payments, and, by separate *Notice* issued today, the Commission will ask for comments on such limitations.

[3] Because a fairly high percentage of all comparative cases (60%) were settled within the first nine months after assignment to a judge, the drop in the percentage of settled cases may be related to the reduction of the number of new cases designated in FY § 89 (292 in FY 1988 versus 114 in FY 1989).

[4] With the implementation of the 1989 amendment to 47 U.S.C. § 158, Pub. L. No. 101-239, 103 Stat. 2106 (December 19, 1989), the hearing fee will be increased to $6,760.

[5] Of those 31 cases, ten settled, but only two settlements were approved in the early stages of the case (within the first three months).

[6] The amount of the hearing fee is established by statute, 47 C.F.R. § 158, and we also propose to seek legislation significantly increasing the amount of the hearing fee. A substantially higher hearing fee undoubtedly would provide an added impetus to settlements.

[7] The earlier provision of that information may also expedite the discovery portion of the case.

[8] Applications are considered "frozen" for comparative purposes after the "B" cut-off date. *See* 47 C.F.R. § 73.3522(a).

[9] This proposed change in Commission policy may also provide strong incentive to all mutually exclusive applicants to join in a settlement of the case by merger.

[10] The settlement judge could recommend such treatment in cases where the merging applicants made good faith efforts to include all mutually exclusive applicants in the merger.

[11] We recognize that a limitation on the amount of money that may be paid to a dismissing applicant will have an impact on the settlement dynamic, but, on the other hand, we believe that some applicants may have been induced to file by the possibility of a profitable settlement. If that profit inducement is removed, and its removal results in fewer applicants for available facilities, we may continue to see significant numbers of settlements, and, in those cases that are not settled, a reduction in the number of applicants will facilitate earlier decisions. *See* note 5 and accompanying text.

[12] Since 1986, it appears that the policy has been applied in only three cases besides *Ruarch*. They were: *WCVQ*, *supra*; *Mark W. Wodlinger*, FCC 891-04 (Gen. Counsel Jan. 10, 1989); and *Breaux Bridge Broadcasters Limited Partnership*, 4 FCC Rcd 5409 (Rev. Bd. 1989).

[13] The assignment of an ALJ and the establishment of procedural dates in the HDO will require coordination between the Chief ALJ and the application processing staff. In practice, the Bureau would briefly describe the case to the Chief ALJ in terms of the number of applicants and the issues that will be designated. The Chief ALJ would then assign the case to a judge in the normal manner and consult with that judge on the setting of procedural dates. That information would then be communicated to the Bureau for inclusion in the HDO.

[14] *See Amendment of Part I, Rules of Practice and Procedure to Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings*, 52 RR 2d 913 (1982);

Paglin, Report on Evaluation of the Federal Communications Commission's Discovery Procedures in Adjudicatory Hearings (1980).

[15] Irrespective of whether the *Anax* doctrine is retained or eliminated, where an applicant has made misrepresentations to the Commission or engaged in other misconduct during the application process, in addition to denying the application, the Commission intends to consider delegating authority to the ALJs to impose a forfeiture of up to the statutory limit against the applicant. *See* Section 3002 of the Omnibus Budget Reconciliation Act of 1989, Public Law No. 101-239, 103 Stat. 2106, codified at 47 U.S.C. § 503(b); *see also* Conference Report to accompany H.R. 3299, H.R. Rep. No. 386, 101st Cong., 1st Sess. (1989), reprinted in the *Congressional Record* of Nov. 21, 1989, H9333, H9454.

[16] 5 U.S.C. § 556(d).

[17] *See* 47 C.F.R. § 1.248; *Amendments of Parts 0 and 1 of the Commission's Rules with Respect to Adjudicatory Re - Regulation Proposals*, 58 FCC 2d 865 (1976).

[18] In fact, the judges issued their decisions, on average, within three months of the last pleading.

[19] If the settlement judge procedure is adopted, it would be necessary to permit more time between the exchange of exhibits and the commencement of trial for those cases in which the parties seek to end the litigation through that process.

[20] The time limit on the ALJs is permissible so long as it does not unduly interfere with a judge's independence to control the course of the proceeding, *Butz v. Economou*, 438 U.S. 478, 513 (1978), or subject the judge to performance appraisals. *See* 5 C.F.R. § 930.211. We do not believe that the proposed time guideline for decisions unduly circumscribes an ALJ's independence, and the proposed guideline would not be used for performance appraisals.

[21] As previously noted, the average comparative case takes 33 months from HDO to final Commission decision. Of that time, the case is before an ALJ for an average of 17 months and on appeal to the Review Board and the Commission for an average of 16 months.

[22] Our review of current cases reveals that the Commission takes an average of 9 months to dispose of appeals from Review Board decisions.

[23] In considering this option in the context of broadcast comparative new applicant proceedings, we recognize that the Board also provides an intermediate level of review for IDs in other broadcast and non-broadcast hearing cases, and it considers appeals from ALJ's interlocutory decisions in all hearing cases. However, review of IDs in broadcast comparative new applicant cases is a major portion of the Board's function, and the elimination of that role would severely undercut the rationale for the continuing existence the Review Board. Thus, if we eliminate intermediate review of IDs in broadcast comparative new applicant cases, most probably, we would also be eliminating such review for all other hearing cases. In such circumstances, we would also have to consider the appropriate locus of review for interlocutory decisions in hearing cases.

[24] Because the Review Board is carried as a separate line item in the Commission's budget, any decision to relocate the Board, change its composition or eliminate it entirely would be submitted to both the House and Senate Budget Committees for informal approval before implementation.

[25] When Congress included in the Communications Act a separation of functions provision for "employee board[s]", it had in mind the separation of functions requirement that is codified in the APA. Indeed, at the same time, Congress amended the Act to provide that the APA separation of functions requirement (which is normally not applicable to initial licensing proceedings) be applied in FCC licensing proceedings. See 47 U.S.C. § 409(c)(2). The legislative history also refers expressly to the *Attorney General's Manual's* discussion of separation of functions, which states, in pertinent part, that the prohibition does not preclude hearing examiners from obtaining "advice from or consult[ing] with" agency heads or "being under the supervision of the general counsel." *See Attorney General's Manual on the Administrative Procedure Act*, U.S. Dept. of Justice (1947) at 55-56; S. Rep. No. 576, 87th Cong., 1st Sess. 9, 1961. It may well be that the statement that such officials could be "supervised" by the General Counsel should be read narrowly in light of separate APA provisions intended expressly to guarantee the ALJs' independence from agency officials. *See generally* Butz v. Economou, 438 U.S. 478, 513 (1978); *Nash v. Califano*, 613F.2d 10 (2d Cir. 1982). There are, however, no similar statutory policies that apply to the Review Board, which, like the Commission, is a statutory reviewing body (although its existence is not required by statute).

[26] The Board, unlike the ALJs, does not have statutory guarantees of independence from agency influence.

[27] The rules currently provide that "[n]either the Commission nor any of its members will discuss the merits of any matter pending before the Board with the Board or any of its members." 47 C.F.C. § 0.361(b). As discussed above, this rule does not appear to be required by the Act and could be deleted.

[28] Section 155(c)(1) requires that any such Board consist of at least two employees.

[29] S. Rep. No. 576, 87th Cong., 1st Sess. 8 (1961).

[30] A requirement that the Commission make annual reports to Congress on this subject was deleted in 1980. Public Law 96-470, 94 Stat. 2237, October 19, 1980.

[31] The provision was enacted in 1952, prior to the authorization of the Review Board.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases

Since my arrival at the Commission, I have heard the horror stories of parties waiting over three years from the time they filed applications until their applications were granted. Clearly, the comparative hearing process needs to be reformed and made more efficient. We have an obligation to work diligently to improve our processes in order that we can speed broadcast service to the public. I believe the proposals contained in this Notice provide suggestions that can make our process more efficient and ensure that broadcast comparative proceedings will be concluded in a timely fashion.

While I support the Commission's efforts herein to reform the comparative "new" process, I write separately to voice concern over the proposals to eliminate or reorganize the Review Board. I believe that the Review Board currently serves a valuable role as an independent level of review. The Review Board may not always follow the policy objectives of the existing Commission, but it does apply existing precedent in making public interest determinations.

Although I recognize that it is the Commissioners who are charged with making the ultimate public interest determinations, I am not convinced that the Review Board

process undermines that authority. A Review Board analysis can provide a different and independent perspective to the Commission's policy review process. At the same time, the Commissioners have the ability to overturn any decision of the Review Board with which they disagree.[1]

Moreover, the Review Board process takes an average of seven months. I am not certain its elimination or reorganization will significantly improve the time frame for decision by the Commission. It would appear that if our concern is over time, then we could mandate that the intermediate review process be accomplished in a set time frame. In addition, we could propose additional staffing for the Review Board to expedite the intermediate review process.

Accordingly, while I do not disagree with seeking comments on this matter, it will take an extremely well-reasoned argument to convince me to eliminate the Review Board or remove its autonomy.

FOOTNOTE TO STATEMENT

[1] Nonetheless, if the Commission desires that the Review Board be more in tune with current policies we can modify Section 0.361 (b) of our rules. This change would permit the Commissioners to consult with the Review Board without the drastic step of reorganization.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

RE: Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases

I generally support this item; I will vote to explore the merits of its various proposals to expedite the comparative hearing process. I have serious reservations, however, about the notions it puts forth to alter the function of the Review Board, or to relocate it and reduce its autonomy.

I believe that it is essential to retain a system of checks and balances in our licensing process, and the Review Board is an integral part of this Commission's system of checks and balances. Efficiency and speed in delivering new broadcast service to the public are important goals, but they are not our only goals. I do not think that we should jeopardize the independence of the Review Board for the sake of efficiency, particularly when the Review Board already functions more expeditiously and efficiently than most other stages in the licensing process.

I would find it difficult, if not impossible, therefore, to support any scheme that would compromise the existence or independence of the Review Board.